STATE OF ALASKA

IBLA 87-810, 87-814 Decided February 13, 1990

Appeals from decisions of the Alaska State Office, Bureau of Land Management, rejecting State selection applications. AA-12883, AA-12663.

Affirmed.

1. Alaska: Statehood Act--Alaska Native Claims Settlement Act: Withdrawals and Reservations: Withdrawals for Native Selection: State-Selected Lands--Res Judicata--State Selections--Withdrawals and Reservations: Effect Of

The Board will affirm BLM's rejection of State selection applications filed for land which, at the time of selection, was withdrawn by a public land order from State selection pursuant to sec. 17(d)(1) of the Alaska Native Claims Settlement Act, where the question of the validity of the order was determined as a result of the dismissal with prejudice of a prior judicial proceeding in which the order was expressly challenged, and as a result of an agreement between the appellant and the United States not to challenge the order in the future.

APPEARANCES: Elizabeth J. Barry, Esq., Office of the Attorney General, State of Alaska, for appellant; James R. Mothershead, Esq., Office of the Regional Solicitor, U.S. Department of the Interior, Anchorage, Alaska, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE HUGHES

The State of Alaska has appealed from two decisions of the Alaska State Office, Bureau of Land Management (BLM), dated August 18, 1987, rejecting State selection applications AA-12663 and AA-12883. By order dated October 22, 1987, the Board consolidated the State's appeals for purposes of review.

On December 29, 1976, and April 1, 1977, the State filed its selection applications for all open, available lands situated T. 52 S., Rs. 71 and 72 W. (AA-12663), and T. 48 S., R. 69 W. (AA-12883), Seward Meridian, Alaska, pursuant to section 6(b) of the Act of July 7, 1958 (the Statehood Act), 72 Stat. 340 (1958). Under the provision, the State is entitled to select certain acreage from the public lands "which are vacant, unappropriated, and unreserved at the time of their selection." 72 Stat. 340 (1958). In its August 1987 decisions, BLM rejected the State's selection
applications because the lands sought "were not available at the time of

application nor are they now vacant, unreserved and unappropriated" as required by the Statehood Act and 43 CFR 2627.3(a).

In the case of application AA-12663, BLM held as follows:

> The selected lands were withdrawn on September 14, 1973, by Public Land Order (PLO) 5175 as amended by PLO 5394 and reserved for village and regional selection under Sec. 12 of the Alaska Native Claims Settlement Act (ANCSA) of December 18, 1971, (85 Stat. 688). The Aleut Corporation filed selection application F-16169 on December 15, 1977, for these lands.
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> On December 2, 1980, Sec. 303(1)(iv) of the Alaska National Interest Land Conservation Act (ANILCA) of December 2, 1980 (94 Stat. 2371)[,] placed these lands within the Alaska Peninsula Unit of the Alaska Maritime National Wildlife Refuge.

BLM held as follows concerning State selection application AA-12883:

> The selected lands were withdrawn on March 9, 1972 by [PLO 5170] and reserved pursuant to Sec. 17(d)(2) of [ANCSA] for possible addition to a conservation unit system. On September 15, 1972, PLO 5251 removed the withdrawal under Sec. 17(d)(2) and placed these lands in the withdrawal under Sec. 17(d)(1) of ANCSA to determine if there were any public interests which required protection.
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> The selected lands were further withdrawn on September 14, 1973, by PLO 5394 and reserved for village and regional selection under Sec. 12 of ANCSA. The Aleut Corporation filed selection application AA-16169 on December 15, 1977 for these lands.
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> Section 302(1) of [ANILCA] further withdrew these lands for the Alaska Peninsula National Wildlife Refuge.

There is a somewhat complicated history of PLOs affecting these lands. Some additional background may clarify the operation of these PLOs.

Initially, PLO 5175 (37 FR 5576 (Mar. 16, 1972)), provided that, subject to valid existing rights, certain lands, including T. 52 S., Rs. 71 and 72 W., Seward Meridian (those later selected in application AA-12663), were "withdrawn from all forms of appropriation under the public land laws, including selections by the State of Alaska under the Alaska Statehood Act." The PLO cited as authority sections 11(a)(3) and 12 of ANCSA, 43 U.S.C §§ 1611(a)(3) and 1612 (1970), as well as Exec. Order (EO) No. 10355, 17 FR 4831 (May 26, 1952), and section 17(d)(1) of ANCSA, as amended, 43 U.S.C. § 1616(d)(1) (1970). 1/ The PLO further stated that the subject lands

1/ Section 1 of EO No. 10355 delegated to the Secretary of the Interior the withdrawal authority vested in the President by section 1 of the Act

were reserved for study by the Secretary of the Interior for the purposes of classification or reclassification of any lands not conveyed under section 14 of ANCSA.

Thus, the lands covered by application AA-12663 remained under the coverage of PLO 5175 until the application was filed. The lands in application AA-12883, by a circuitous route, also came under the terms of PLO 5175 prior to filing of the application, as we shall see.

The latter lands were initially withdrawn by PLO 5179 (37 FR 5579 (Mar. 16, 1972)), which stated that, subject to valid existing rights, cer-tain described lands, including T. 48 S., R. 69 W., Seward Meridian (those later selected in application AA-12883), were "withdrawn from all forms of appropriation under the public land laws, including selections by the State of Alaska under the Alaska Statehood Act." The PLO cited as authority sections 17(d)(1) and (2)(A) of ANCSA, as amended, 43 U.S.C. §§ 1616(d)(1) and (2)(A) (1970), as well as EO No. 10355. PLO 5179 further stated that the subject lands were reserved for study and possible recommendation to Congress as additions to the national park, forest, wildlife refuge, and wild and scenic rivers systems. Finally, PLO 5179 reserved these lands for study by the Secretary of the Interior for the purposes of classification "as appropriate."

However, in September 1972, PLO 5251 (37 FR 18911 (Sept. 16 (1972)) removed lands, including those covered by application AA-12883, from the coverage of PLO 5179, but immediately placed them with those lands subject to PLO 5180 (37 FR 5583 (Mar. 16, 1972)). PLO 5180 had affected a large area not initially including the lands covered by either selection application. This action created no gap in the withdrawal, as PLO 5251 stated that the added lands immediately became subject to all of the terms and conditions of PLO 5180, including the withdrawal of the lands from selection by the State of Alaska under the Alaska Statehood Act.

This was not the end of the reshuffling. About a year later, PLO 5394 (38 FR 26375 (Sept. 20, 1973)), removed lands, again including those covered by application AA-12883, from the coverage of PLO 5180 and placed them with those lands subject to PLO 5175. Again, no gap in the withdrawal occurred,

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fn. 1 (continued)
of June 25, 1910, as amended, 43 U.S.C. §§ 141, 142 (1970), as well as the "authority otherwise vested in him to withdraw or reserve lands of the public domain." 17 FR 4831 (May 26, 1952); see Harry H. Wilson, 35 IBLA 349, 355-56 (1978); Denver R. Williams, 67 I.D. 315, 316 (1960). However, effective Oct. 21, 1976, section 704(a) of the Federal Land Policy and Management Act of 1976, 90 Stat. 2792 (1976), repealed the withdrawal authority contained in section 1 of the Act of June 25, 1910, as well as "the implied authority of the President to make "withdrawals and reservations resulting from acquiescence of the Congress (United States v. Midwest Oil Co., 236 U.S. 459 [(1915)]," subject to pre-existing withdrawals. See Wisenak, Inc. v. Andrus, 471 F. Supp. 1004, 1007-08 (D. Alaska 1979), and cases cited therein.

as PLO 5394 also stated that the added lands immediately became subject to all of the terms and conditions of PLO 5175, including withdrawal of the lands from selection by the State of Alaska under the Alaska Statehood Act.

Thus, the parcels of land covered by both applications at issue in this appeal were covered by PLO 5175 as of September 14, 1973. The State did not file its selection applications for either parcel until well after this date. BLM rejected the State's selection applications because, owing to PLO 5175, as amended by PLO 5251 and PLO 5394, the lands were withdrawn from State selection. The State appealed to this Board from these deci-sions, challenging BLM's determination that the land encompassed by State selection applications AA-12663 and AA-12883 was not available for selection by the State at the time the land was selected in December 1976 and April 1977.

These appeals, as originally briefed by the parties, presented sub-stantial questions concerning the application of section 17 of ANCSA. 2/
However, it is unnecessary to reach these issues, as we have determined that our consideration of these appeals is barred.

2/ The State and BLM agree that all withdrawals effected pursuant to section 11(a)(3) of ANCSA expired prior to the filing of the State's applica-tions. The dispute centers on whether the lands were also withdrawn at the time of the State's applications by virtue of withdrawals independently effected pursuant to section 17(d)(1) of ANCSA.

The State argues, to the extent that the land remained withdrawn pur- suant to section 17(d)(1) of ANCSA after the expiration of the section 11 withdrawals, such withdrawals did not preclude the State from selecting land formerly withdrawn under section 11(a)(3), citing section 17(d)(1)
of ANCSA: "Withdrawals pursuant to this paragraph shall not affect the authority of * * * the State to make selections and obtain patents within the areas withdrawn pursuant to section 1610 of this title." 43 U.S.C. § 1616(d)(1) (1976). Thus, the State contends that, even if the lands were withdrawn under section 17, the withdrawal does not bar State selection.

BLM counters that the withdrawals effected pursuant to section 17(d)(1) of ANCSA continued in effect after the expiration date of the section 11 withdrawals and were therefore in effect at the time the State's selection applications were filed in accordance with PLO 5561 (40 FR 58857 (Dec. 19, 1975)), as amended. PLO 5561 provided that, "[o]n March 31, 1976, all those lands not under pending application for Native selection shall
become available for State selection unless otherwise provided in any statute, regulation, court decree, contract, or public land order" (40 FR 58857 (Dec. 19, 1975) (emphasis supplied)). BLM argues that it was "other- wise provided" at that time by PLO 5175 that the land was withdrawn from State selection.

Moreover, BLM argues that the section 17(d)(1) withdrawals precluded that State from selecting the land, asserting that the language in section 17(d)(1) of ANCSA to which the State refers was not operative after
the section 11(a)(3) withdrawals expired on Dec. 18, 1975. BLM asserts

By motion to dismiss filed on May 16, 1988, BLM requested that we dismiss the pending appeal, asserting that it is barred by the district court's September 1, 1972, dismissal with prejudice of the civil action captioned State of Alaska v. Morton, No. A-48-72 (D. Alaska), as well as a September 2, 1972, Memorandum of Understanding (MOU) between the State of Alaska and the United States, upon which the dismissal was based. Specifically, BLM contends that the State of Alaska is precluded from relitigating in these appeals the question of whether PLO 5175, pursuant to sec-tion 17(d)(1) of ANCSA, validly withdrew the affected land from subsequent State selections. BLM asserts that this issue was finally litigated in the judicial proceeding in State of Alaska, and that the parties entered into a binding settlement agreement which concluded the matter.

The State opposes BLM's motion to dismiss, contending that no judicial proceeding or agreement between the State of Alaska and the United States has ever decided the question of the extent to which section 17(d)(1) of ANCSA authorized withdrawal from State selection of land formerly withdrawn by section 11(a) of ANCSA. The State further asserts that the September 1972 MOU cannot bar consideration of whether PLO 5175 continued to withdraw the subject land from State selection at the time the State's selection applications were filed because, it asserts, the MOU did not encompass the lands at issue herein. Finally, the State maintains that, although the MOU may have acknowledged the validity of PLO 5175, the State is not challenging the validity of PLO 5175 as of the date of the MOU in these appeals, but rather BLM's later interpretation of the PLO as indefinitely forbidding State selection pursuant to section 17(d)(1) of ANCSA.

As applied in the judicial context, the doctrines of res judicata (claim preclusion) and collateral estoppel (issue preclusion) both bar the relitigation of an issue already litigated by the same parties and set-tled by a final judgment on the merits. See Turner Brothers Inc. v. OSMRE, 102 IBLA 111, 120 (1988); United States v. Johnson, 23 IBLA 349, 354-55 (1976); see generally Southern Pacific Railroad Co. v. United States, 168 U.S. 1, 48-49 (1897); Kaspar Wire Works, Inc. v. Leco Engineering & Machine, Inc., 575 F.2d 530, 535-36 (5th Cir. 1978). 3/ These doctrines

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fn. 2 (continued)
that, upon the expiration of the withdrawals, the land could no longer be considered "withdrawn pursuant to section 1610 of this title," within the meaning of section 17(d)(1) of ANCSA.

BLM also asserts that PLO 5561 independently barred State selections
at the time the State's selection applications were filed because the land could not be considered available for State selection because PLO 5175 "otherwise provided" at the time that the land was withdrawn from State selection (40 FR 58857 (Dec. 19, 1975)).

3/ The doctrine of res judicata applies where subsequent litigation is instituted that involves the same cause of action as prior litigation. Under the doctrine of res judicata, the cause of action is deemed to have merged in the final judgment previously rendered, thus barring subsequent consideration of all relevant issues whether or not raised during the prior litigation. By contrast, the doctrine of collateral estoppel applies even

are equally applicable to preclude an administrative proceeding which would involve relitigation of an issue previously resolved in a judicial proceeding between the same parties. Supron Energy Corp., 46 IBLA 181, 194 (1980); United States v. Zwang, 26 IBLA 41, 52, 83 I.D. 280, 285 (1976); cf. Chisholm v. Defense Logistics Agency, 656 F.2d 42, 46-47 (3rd Cir. 1981); Otherson v. Department of Justice, 711 F.2d 267, 271-72 (D.C. Cir. 1983). We, therefore, turn to the question of whether judicial resolution of State of Alaska affects the determination of the instant appeal.

Along with its motion to dismiss, BLM has provided relevant documents involved in the case of State of Alaska. From these, we note that on April 10, 1972, the State filed suit with the Federal District Court in Alaska. The complaint indicates that the State initiated the suit to challenge various PLOs, including PLO 5175, to the extent that certain prior State selections and the right to make future State selections were deemed subordinated and made subject to the withdrawal of the underlying land effected by those PLOs pursuant to section 17(d) of ANCSA. 4/ The State asserted in that complaint that the PLOs are arbitrary, capricious, an abuse of discretion, and contrary to statutory authority to the extent that they subordinate the State's prior selections and right to make future selections to the section 17(d) withdrawals, and requests the court to set aside the PLOs to that extent.

Thereafter, the State of Alaska and the United States entered into negotiations in an effort to resolve the suit. On September 1, 1972, the parties filed a stipulation seeking dismissal of the suit. That stipulation states that the parties "have entered into a memorandum of understanding [MOU] which fully and satisfactorily resolves the present dispute between the parties" and requests the court to dismiss the suit with prejudice.

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fn. 3 (continued)
where there are different causes of action and only precludes consideration of issues actually litigated and necessary to the final judgment previously rendered. See Kaspar Wire Works, Inc. v. Leco Engineering & Machine, Inc., supra at 535-36; United States v. Fleming, 20 IBLA 83, 98 (1975).

4/ In the case of PLO 5175, the complaint states that the State "does not place in issue, or dispute the effect of, or in any way contest" paragraphs 1 through 3 of the PLO. However, the State did contest paragraph 4 of PLO 5175 which effected the withdrawal pursuant to section 17(d)(1) of ANCSA. Of course, the question of the effect of section 17(d) is directly at issue in this appeal.

The relevant language of the complaint prays:

"That this Court review the administrative actions involved in the issuance and filing of the public land orders * * * described in * * * [paragraph] 8-c of the first claim for relief, excluding the exceptions set forth in paragraph 8-d of the first claim for relief, [thereby encompassing paragraph 4 of PLO No. 5175] * * * and that this Court declare unlawful and set aside such public land orders to the extent that the right of the State of Alaska to select land pursuant to * * * [section 6(b)] of the Alaska Statehood Act is subordinated to and made subject to such public land orders or portions thereof."

By order dated September 1, 1972, the district court dismissed the suit with prejudice.

The MOU was actually executed by the parties on September 2, 1972. 5/ Under the MOU, the Secretary agreed to take the necessary steps, including issuing and amending PLOs, to make certain lands available for State selection, to withdraw other lands pursuant to sections 11(a)(3) and 17(d)(1) of ANCSA, to make certain lands already withdrawn for Native corporations available for State selection following the completion of Native corporation selections, and to take other action. The MOU further states that "[t]he State and the Secretary agree that lands not specifically described herein are no longer in controversy and their selection, withdrawal, or disposition are not relevant to the settlement of any litigation between the State and the Secretary." None of the subject land was described in the September 1972 MOU. Finally, the MOU states that "[t]he State further agrees not to challenge the validity of Public Land Orders 5150, 5151, 5156, 5169 through 5188, and 5190 through 5195."

While not expressly stated as the basis of the August 1987 BLM decisions, BLM's conclusion that the subject lands were not available for State selection at the time the State's selection applications were filed was clearly based on the fact that the lands were withdrawn at that time from State selection pursuant to section 17(d)(1) of ANCSA by PLO 5175, as that order was applied either in its unamended state in the case of State selection application AA-12663 or as amended by PLO 5394 in the case of State selection application AA-12883. Indeed, as noted above, the withdrawal effected by PLO 5175 pursuant to section 17(d)(1) of ANCSA was still in effect at the time the State selection applications were filed in December 1976 and April 1977, having neither expired nor been terminated. Cf. Allan Kaiser, 72 IBLA 387, 388-89 (1983). Moreover, the PLO expressly withdrew the subject lands from selection by the State of Alaska under the Alaska Statehood Act.

In asserting that the subject land was available for State selection at the time its selection applications were filed, the State necessarily disputes the validity of the withdrawal effected by PLO 5175 pursuant to section 17(d)(1) of ANCSA. In essence, the State contends that the PLO is contrary to the express language of section 17(d)(1), which states that such withdrawals "shall not affect the authority of * * * the State to make selections" (43 U.S.C. § 1616(d)(1) (1982)). Indeed, the State expressly asserts that such actions are "ineffective because [they are] outside the limits placed by Congress on [the Secretary's] authority" (SOR at 6). See also Reply to BLM's Answer at 5.

Against this background, we are not persuaded by the State's assertion that it is not challenging the validity of PLO 5175 to the extent that it withdrew the subject land from State selection pursuant to section 17(d)(1) of ANCSA at the time of promulgation of the PLO, but only BLM's "interpretation" that the PLO continued to withdraw the subject land 5 years after

5/ The MOU is attached to BLM's Motion to Dismiss at page 10 of exhibit C.

that date when the State selection applications were filed. We fail to see the distinction. What the State is challenging is the ability of the PLO to withdraw the subject land from State selection pursuant to section 17(d)(1) of ANCSA at any time, whether immediately upon promulgation of the PLO or at any time thereafter. BLM's "interpretation" consists merely in the application of the section 17(d)(1) withdrawal effected by the PLO, which remained unchanged from 1972 to 1976-77, to the specific State selection applications involved herein.

We conclude that the State's appeal herein directly challenges the validity of PLO 5175 to the extent that it withdrew the subject lands from State selection pursuant to section 17(d)(1) of ANCSA. The validity of this portion of the PLO was at issue in the State of Alaska suit, wherein the State asserted that PLO 5175 was unlawful and should be set aside to the extent that it would preclude future State selections (like State selections AA-12663 and AA-12883) by withdrawing land from State selection pursuant to section 17(d)(1) of ANCSA. Thus, this question was ultimately decided by the court's dismissal with prejudice of the State's suit, unless something to the contrary was stated in the parties' agreement resolving the matter in controversy or the court's final judgement based thereon.

In the present case, in the September 1972 MOU, the State expressly agreed "not to challenge the validity of Public Land Orders * * * 5169 through 5188," including PLO 5175 (Exh. C attached to Motion to Dismiss
at 11). We find no ambiguity in this language. Also, the district court did nothing to detract from the evident disposition of the State's chal- lenge to the validity of PLO 5175, among others.

Referring to language in paragraph 10 of the MOU that the parties agree that "lands not specifically described herein are no longer in controversy and their selection, withdrawal, or disposition are not relevant to the settlement of any litigation between the State and the Secretary," and to the fact that the MOU did not specifically describe the subject lands, the State contends that "the withdrawal of the land at issue here and its selection by Alaska are not affected or governed by the settlement" (Opposition to Motion to Dismiss at 3). We are not concerned, however, with what effect the settlement had on the subject lands, but rather what effect the settlement had on the question of the validity of PLO 5175. The State here ignores the subsequent statement in paragraph 11 of the MOU that the State agrees not to challenge the validity of that PLO. We cannot read that statement in any narrow sense, construing it as applicable only in the case of certain lands subject to the PLO. Rather, it has broad implications, indicating that the parties intended to foreclose all future challenges to the PLO.

The State asserts that resort must be had to the subsequent conduct of the parties to the MOU in order to resolve ambiguity in the MOU. While we find no ambiguity, the conduct to which the State refers indicates only that the question of whether State selections were precluded on land withdrawn pursuant to section 17(d)(1) of ANCSA in the Bristol Bay region, including

the subject lands, has remained an unresolved question for many years, which question, at the direction of Congress, could be resolved either by agreement of the State and the Secretary or, if necessary, by adjudication. See S. Rep. No. 413, 96th Cong., 1st Sess. 254, reprinted in 1980 U.S. Code Cong. & Admin. News 5070, 5198-99. The State purports to find in the fact that the question has never been resolved, other than by the MOU, proof that neither the Secretary nor Congress has regarded the conclusion of the judicial proceedings in State of Alaska as resolving the matter.

However, the State has offered no evidence that at any time subsequent to the September 1972 MOU has it ever disavowed its agreement not to chal-lenge the validity of PLO 5175 or has the MOU been rescinded or abandoned in that respect. To the contrary, the legal effect of the September 1972 MOU and order of dismissal was evidently reaffirmed by the State and the United States in a stipulation entered into on August 15, 1981, in settle- ment of the case of State of Alaska v. Reagan, No. A78-291 (D. Alaska) Exh. B attached to Supplementary Showing in Support of Motion to Dismiss Appeal at 6). Indeed, in that stipulation, the Secretary expressly
agreed to "modify" certain PLOs, including PLO 5175, "so as to eliminate
the restrictions arising from Executive Order 10355 which the Public Land Orders impose on valid future selections by the State of Alaska." Id. at 5. This language in itself, to the extent that it recognized that the Secretary would have to modify PLO 5175 in order to open the land to State selection, reaffirmed the contin-uing validity of the PLO with respect to the with- drawal of land from State selection at least pursuant to the EO. The stip- ulation was adopted by the district court as its final judgment. Exhibit C attached to Supple-mentary Showing in Support of Motion to Dismiss Appeal.

The district court's dismissal of the complaint in State of Alaska is a final judgment on the merits of that cause of action. As the court stated in Smoot v. Fox, 340 F.2d 301, 303 (6th Cir. 1964): "Dismissal of an action with prejudice is a complete adjudication of the issues presented by the pleadings and is a bar to a further action between the parties." See also Lawlor v. National Screen Service Corp., 349 U.S. 322, 327 (1955); Gambocz v. Yelencsics, 468 F.2d 837, 840 (3rd Cir. 1972); Esquire v. Varga Enterprises, 185 F.2d 14, 17 (7th Cir. 1950); Cleveland v. Higgins, 148 F.2d 722, 724 (2nd Cir.), cert. denied, 326 U.S. 722 (1945); Reynolds v. International Harvester Co., 141 F. Supp. 371 (N.D. Ohio 1955); 50 C.J.S. Judgments § 633(c) (1947). This bar is equally applicable where dismissal is obtained as a result of agreement of the parties to a suit, "in the absence of anything to the contrary expressed in the agreement and contained in the judgment itself." United States v. Parker, 120 U.S. 89, 95 (1887); see also Nashville, Chattanooga & St. Louis Railway Co. v. United States, 113 U.S. 261, 266 (1885); Schram v. Poole, 111 F.2d 725, 727 (9th Cir. 1940); 50 C.J.S. Judgments § 634 (1947).

The agreement executed by the State and the United States resolved the dispute between the parties, including that concerning the validity of the section 17(d)(1) withdrawal effected by PLO 5175, to the degree that the State agreed not to challenge that validity, and, based upon that agreement, the court, at the request of the parties, dismissed the suit with prejudice. In these circumstances, dismissal constituted a complete adjudication of the

issue of the validity of the section 17(d)(1) withdrawal effected by PLO 5175 which was raised by the pleadings in State of Alaska and, thus, in the absence of any modification of the settlement, barred any future challenges to the PLO, such as that raised herein.

Even apart from the above, we conclude that the State is bound by its agreement in the September 1972 MOU not to challenge the validity of PLO 5175. That agreement is properly treated as binding on the State because it has never been properly rescinded or otherwise terminated. United States v. ITT Continental Baking Co., 420 U.S. 223, 238 (1975); Village of Kaktovik v. Watt, 689 F.2d 222, 230 (D.C. Cir. 1982); Warner v. Rossignol, 513 F.2d 678, 682 (1st Cir. 1975); Clinton Street Greater Bethlehem Church v. City of Detroit, 484 F.2d 185, 189 (6th Cir. 1973); 15A C.J.S. Compromise & Settle-ment § 26 (1967).

Therefore, we conclude that the gravamen of the State's current appeal was already decided by the conclusion of the judicial proceedings in State of Alaska. Thus, we hold that the State is barred from relitigating the question of whether PLO 5175 validly withdrew the subject lands from State selection pursuant to section 17(d)(1) of ANCSA and those lands must be deemed to have been withdrawn from State selection at the time State selection applications AA-12663 and AA-12883 were filed in December 1976 and April 1977. In these circumstances, we conclude that BLM properly rejected the State's selection applications in its August 1987 decisions and that these decisions, accordingly, must be affirmed. State of Alaska, 18 IBLA 351 (1975).

Section 906(e) of ANILCA, 43 U.S.C. § 1635(e) (1982), allows the
State to file new selection applications that will automatically apply to any lands that become available in the future (following the filing of the new applications), without the necessity of amending the new applications
as such lands become available. Section 906(e) provides only that State selection applications filed after ANCSA will automatically embrace lands that "become" available for selection after the filing of the new appli- cation. While the filing of the new application does not prejudice rights under the pre-existing applica-tion, if any, section 906(e) is not intended, as the dissent suggests, to enhance the validity of previously-filed State selection applications. 6/

On August 17, 1981, the State did amend the selection applications at issue here as provided in section 906(e). At this time, regardless of the validity of PLO 5175, the lands were not available for selection, having been selected by the Aleut Corporation on December 15, 1977. Thus, all that the State's section 906(e) filings in August 17, 1981, accomplished was to make it unnecessary for the State to refile selection applications if the lands became available again in the future. 7/

6/ State of Alaska, 109 IBLA 339 (1989), cited by the dissent, is not to the contrary.

7/ The phrase in section 906(e), "regardless of whether [the date the lands become available] occurs before or after the expiration of the State's land

The only rights at issue in this appeal are those stemming from State selection applications AA-12663 and AA-12883 in 1976 and 1977; if the lands were not open in 1976 and 1977, these applications were properly rejected. These lands were withdrawn by PLO 5175 in 1973, prior to the State's selec-tion applications, and the validity of PLO 5175 is not subject to review. Accordingly, BLM's decisions must be affirmed.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the August 1987 BLM decisions appealed from are affirmed.

David L. Hughes
Administrative Judge

I concur:

Wm. Philip Horton
Chief Administrative Judge

fn. 7 (continued)
selection rights," is apparently limited to preserving new State selection applications filed under section 906(e) from rejection on the ground that deadlines established in other statutes may have passed before lands are made available by the rejection of competing applications.

ADMINISTRATIVE JUDGE MULLEN DISSENTING:

Two events transpired after the parties entered into the September 1972 Memorandum of Understanding (1972 MOU) which cause me to conclude that the decision rejecting the State of Alaska applications is in error. I find nothing in the file to indicate that the applications should be rejected for the reasons stated in the August 18, 1987, decisions.

The first subsequent event following the 1972 MOU was the enactment of section 905(e) of the Alaska National Interest Lands Conservation Act (ANILCA), 94 Stat. 2371, now found at 43 U.S.C. § 1635(e) (1982). This section permits the State to

> file future selection applications and amendments thereto * * * for lands which are not, on the date of filing of such applications, available [for selection under the Alaska Statehood Act]. Each such selection application, if otherwise valid, shall become an effective selection * * * upon the date the lands become available within the meaning of [the Alaska State-hood Act] regardless of whether such date occurs before or after expiration of the State's land selection rights. Selec-tion applications heretofore filed by the State may be refiled so as to become subject to the provisions of this subsection; except that no such refiling shall prejudice any claim of valid-ity which may be asserted regarding the original filing of such application. [Emphasis added.]

This section of ANILCA amended the Statehood Act to permit the State to file a new application and amend a previously filed application to include lands not vacant, unappropriated, and unreserved when the section 906(e) top filing application or amendment was filed. 1/

Section 906(e) provides that the State selection applications (and amendments thereto) shall become an effective selection upon the date the lands become available within the meaning of the Alaska Statehood Act. Unless and until the ownership of the lands passes from Federal hands by reason of the exercise of a prior existing right, a top filing application, filed or amended pursuant to section 906(e), remains in effect. So long as there is a possibility that the lands may become available for selec-tion, the top filing application is valid.

On August 17, 1981, the second subsequent event occurred. The State amended its selection applications to take advantage of the provisions of

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1/ The Act specifically provides that the top filing selection shall not prejudice any claim of validity which may be asserted regarding the original filing of such application. This provision cannot be extended to include the claim of invalidity because the land had been withdrawn at the time of the original filing. The intent of this section precludes such interpretation. See State of Alaska, 109 IBLA 339 (1989).

section 906(e) of ANILCA. The 1981 top filing amendments to selection applications AA-12663 and AA-12883 would incorporate the lands in ques-tion if and when the lands became available for selection within the mean-ing of the Alaska Statehood Act, and therefore those applications cannot be rejected because the "lands were not available at the time of the [original] application nor are they now vacant, unreserved, and unappropriated" (Decision at 2). 2/

The BLM decision and the majority opinion are in error.

R.W. Mullen
Administrative Judge

2/ The decision also states that the State's top filing pursuant to "Sec. 906(c) is of no effect." It is wrong in two respects. First, it has the effect stated above, and second, while Sec. 906(c) does not apply, Sec. 906(e) does. See State of Alaska, supra.